IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1145 of 1999

with

SPECIAL CIVIL APPLICATION No 1409 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE D.H.WAGHELA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MAFATLAL INDUSTRIES LTD.& ANR.

Versus

UNION OF INDIA

Appearance:
Special Civil Application Nos. 1145 of 1999
and 1409 of 1998
MR RAKESH GUPTA, with MR UDAY JOSHI, Advocates for
M/S TRIVEDI & GUPTA for Petitioners

MR A.J. PANDYA with MR M.R. SHAH, Advocates
for Respondent No. 1
RULE SERVED for Respondent No. 2, 3, 4, 5

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE D.H.WAGHELA

Date of decision: 11/04/2000

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

Both these petitions are filed by the same petitioner company, but in respect of its two different units, one at Navsari and the other at Nadiad. The petitions raise common questions and have been argued together.

2.1 In Special Civil Application No. 1409 of 1998, the petitioner, has sought a direction on the respondents not to recover any further amount and has challenged the impugned letters dated 15.12.1997 and 12.2.1998 at Annexures "J" and "L" to the petition, demanding payment of a sum of Rs. 1,37,27,275.22, which according to the respondents, the petitioner's unit was liable to pay as on 2.9.1997, on the ground that interest was payable by the petitioner at the rate of 20% per annum from 7.8.1995, i.e. three months after the coming into force of the provisions of Section 11A of the Central Excise Act, 1944 on 26.5.95, on the amount which was liable to be repaid by the petitioner, after losing the appeal which was filed in the Supreme Court, being the amount of refund of duty and interest, which the petitioner had obtained under a decree passed by the Civil Court.

2.2 In Special Civil Application No. 1145 of 1998, the petitioner in respect of its Nadiad unit, has challenged similar recovery of interest at the higher rate of 20% under Section 11AA of the Central Excise Act, 1944 and the demand made on that basis under the impugned letters dated 10th August, 1998 and 30th October, 1998 at Annexures "P" and "Q" to the petition, on the ground that such recovery was beyond the purview of Section 11AA, read with Section 11A(2) of the said Act.

3. The petitioners had filed Suits, which came to be decreed by the Civil Courts for refund of the excise

duty, which was held by the High Court not leviable on blended yarn, prior to the insertion of the Tariff Item No. 18(E) on 16.3.1972.

3.1 In Civil Suit No. 21 of 1979, which was filed by the petitioner in the Court of Civil Judge (Senior Division), Navsari, the Court had passed the following decretal order on 16.6.1980.

> "The defendants shall pay Rs. 1,66,02,357/together with interest at the rate of 12% per annum from 1.4.1976 to 15.6.1980 amounting to Rs. 83,84,191/- with the cost of this suit and further interest at 6% p.a on the principal amount of Rs. 1,66,02,357/- from the date of decree till the realisation of the full amount."

3.2 In Civil Suit No. 32 of 1979, which was filed by the petitioner in the Court of Civil Judge (Senior Division), Nadiad, the Court made the following decretal order on 16.10.1980 in favour of the petitioner.

> "The defendant shall pay Rs. 2,82,33,973.88 together with interest at 12% p.a. from 1.2.1976 till the date of decree and shall also pay running interest at 6% p.a. from the next date of the decree till payment or realisation to the plaintiff and pay the cost of the plaintiff in two sets, i.e. of two advocates and shall bear their own cost."

4. The respondent No.1 had filed appeals against these decrees, in which the High Court granted interim relief on the condition that the respondent No.1 deposits the decretal amounts together with interest and costs and allowed the petitioner company to withdraw such amounts on furnishing Bank guarantees of a Nationalised Bank to the satisfaction of the trial Courts. The High Court allowed both the appeals on 6.4.1984, setting aside the decrees which were made in favour of the petitioner by the trial Courts.

5. The petitioner company thereupon challenged the decision of the High Court before the Hon'ble Supreme Court and the Hon'ble Supreme Court, while granting SLP, passed the following interim order on 14th August, 1984:

> "There will be an interim order pending hearing and final disposal of the appeal, staying the recovery of the amount of excess duty already

recovered by the petitioners from the Central Government pursuant to the decree of the trial Court but if the petitioners lose in the appeals they will refund that amount to the Central Government together with interest at the rate of 12% per annum from the date when they recovered the amount until such repayments. The bank guarantee already furnished by the appellants for the full amount of the excess duty will be continued from time to time until the disposal of the appeals."

5.1 The appeals of the petitioner company were finally dismissed by the Hon'ble Supreme Court on 4.2.1997 and therefore, the refund claims of the petitioner stood rejected. Both the sides agree that direction 7(a) of the Format Order applied to the instant case, as per the order dismissing the appeals. Since the burden of duty was taken to have been passed on by the petitioner, direction Nos. 1 to 4 of the Format Order did not apply to the petitioner's case. Direction 7(a) of the Format Order reads as under:-

"(7)(a) - Where the refund claim is rejected by this Court the assessee who has already obtained any amount by way of refund shall be liable to pay back the same to the Department and the Department shall be entitled to recover the same in accordance with law."

5.2 Therefore, the petitioner company became liable to pay back the amounts, which it had obtained by way of refund, to the Department and the Department became entitled to recover them in accordance with law, as stated in direction (7)(a) of the Format Order. This means, as stipulated in the interim order dated 14.8.1984, the Department became entitled to the refund of the decretal amounts already paid to the petitioner, together with interest at the rate of 12 per cent per annum, on such decretal amount from the dates when they were recovered, until repayments. Such recovery could be effected in accordance with law, which means either under Section 11 of the Central Excise Act, 1944 or by filing a restitution proceeding under Section 144 of the Civil Procedure Code before the Court whose orders were set aside in appeal, which appellate orders came to be confirmed by the Supreme Court.

5.3 Under Section 11 of the said Act, the amounts due to the Government can be recovered, inter-alia, by attachment and sale of excisable goods belonging to the

person liable to pay the amount and if the amount is not so recovered, by preparing a certificate specifying the amount to be forwarded to the concerned Collector for recovery by way of arrear of land revenue from such liable person.

5.4 The other mode of recovery of the amount, which was already obtained by the claimant under the Civil Court's decree and was to be paid back under the orders of the Supreme Court, entitling the Department to recover it in accordance with law, was to make an application for restitution before the trial Court under Section 144 of the Civil Procedural Code, which, inter-alia, provided that on reversal of a decree in any appeal, revision or other proceedings, the Court which passed the decree shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree and for this purpose, the Court may make any orders including orders for the refund of costs and for the payment of interest, damages etc. which are properly consequential on such reversal of the decree.

6. In these two matters, the Supreme Court had already in its interim order given directions to the petitioner that if it loses in its appeals against the appellate orders by which the decrees passed in its favour were reversed, it will have to refund the decretal amounts with interest at the rate of 12 per cent per annum from the dates when they were recovered, until repayments. The Bank guarantees furnished by the petitioner company for the full amount of excise duty was required to be renewed from time to time, until the disposal of the appeals by the Supreme Court.

7. The respondent authorities adopted the following course in these two cases, after the orders of the Hon'ble Supreme Court.

(A) As regards the amount covered in Special Civil Application No. 1409 of 1998, which was repayable by the petitioner company under the orders of the Supreme Court, in response to the petitioner's detailed representation dated 20.2.1997 (Annexure "C" collectively) seeking thirtysix equal monthly instalments and the subsequent representation dated 11.3.1997 (Annexure "C" collectively) made after a meeting with the Commissioner to him, seeking ten to

twelve instalments for the repayment, the Department wrote a letter dated 29.5.1997 (Annexure "D" to the petition - page 36), to the petitioner with a copy of the letter dated 24th April, 1997 of the Supdt. of Central Excise to the Commissioner, stating that the petitioner company was permitted to pay the balance amount in 12 monthly instalments on a condition that the rate of interest was to be charged after 26.8.1995 at the rate of 20% per annum as per the provisions of Section 11AA of the Central Excise Act. The letter of the Department dated 30.5.1997 to the petitioner specified the amounts of instalments and the requirement of payment of 20% interest, to the petitioner. On 30.5.1997, the petitioner wrote a letter at Annexure "E", objecting to the condition of interest rate of 20 per cent, which was imposed with effect from 26th August, 1995, purportedly under Section 11AA of the Act. It was pointed out that the judgement of the Hon'ble Supreme Court was rendered on 4.2.1997 and therefore also, interest at a higher rate could not have been charged from that anterior date. A reference was sought to be made to the Chief Commissioner of Central Excise and Customs, Vadodara by the petitioner. In the representation at Annexure "F" dated 16.6.1997 addressed to the Chief Commissioner, the petitioner contended that Section 11AA was inapplicable because it contemplated payment of interest at the rate fixed by the Board (which was 20 per cent), if the person chargeable with duty determined under sub-section (2) of Section 11A failed to pay such duty within three months from the date of determination. In the present case, there was no question of determination of duty under Section 11A and therefore, it was contended, Section 11AA did not apply. Moreover, there was a rate of interest of 12 per cent on such repayment already fixed by the Supreme Court in its interim order and the company was liable to pay interest at that rate and not under Section 11AA of the Act. The Chief Commissioner was therefore, requested to consider the instalment facility for the petitioner on that basis. On 21.8.1997 (Annex."F"), the petitioner wrote to the Commissioner that it had decided to liquidate its liability in the best possible way, by paying the amount of Rs. 3,80,92,000/-, which was secured by the Bank guarantee, by asking the bankers to honour it in favour of the Department.

For the rest of the amount the petitioner reiterated its request for instalments. On 9.9.1997, by letter at Annexure "H", the petitioner was informed that the Commissioner of Central Excise did not find it necessary to modify his earlier order that facility of payments in instalments be given, if interest from 26.8.1995 was paid at the rate of 20 per cent as per the provisions of Section 11AA of the said Act. By the impugned letters dated 15th December, 1997 (Annexure "J") and 12th February, 1998 (Annexure "L"), the Department asked the petitioner to pay Rs. 1,37,27,275.22 paise on this basis, as the liability worked out as on 2.9.1997.

(B) As regards the amount that was to be repayed by the petitioner as per the order of the Supreme Court, which is the subject matter of Special Civil Application No. 1145 of 1999, the petitioner had made similar representations for instalments on 19.2.1997 and 31.3.1997 as per Annexures "C" and "D" to the petition. In response to these representations, the petitioner received a letter from the Assistant Commissioner of Central Excise, dated 30th April, 1997, at Annexure "E" to the petition, stating that the Commissioner of Central Excise and Customs, Vadodara had granted the permission to pay up the balance amount including interest in twelve monthly instalments. According to the petitioner, it had paid Rs. 12,51,69,240/between 13th March, 1997 and 6th March, 1998. There was admittedly no reference made to payment of interest at the rate of 20 per cent under Section 11AA of the Act in the permission granted by the Commissioner to make payments by 12 monthly instalments. Still however, on 18.3.1998, the Supdt. of Central Excise, Nadiad wrote a letter at Annexure "F" to the petition, stating that the petitioner was liable to pay Rs. 1,64,30,105.87 as interest accrued from 1.1.1997 to 18.3.1998 at the rate of 20 per cent per annum on the reducing amount which had to be paid as per Section 11AB of the Central Excise Act. In response to that letter, the petitioner replied on 20.3.1998 (Annexure "G" to the petition) that Section 11AB did not apply to the petitioner's case and in view of the direction of the Hon'ble Supreme Court that interest was to be paid only at the rate of 12 per cent per annum, it could not have

been charged at the rate of 20 per cent contrary to such direction. The Supdt. of Central Excise, Nadiad, on 23.3.1998, as per Annexure "H" to the petition, wrote to the petitioner that the Supreme Court had in no way granted permission to pay the amount in instalments and that any delayed payment attracted interest at the rate of 20 per cent per annum, under Section 11AB of the said Act. On 21st April, 1998, as per Annexure "H", to the petition, the petitioner informed the Superintendent of Central Excise that it had made all the payments as per the order of the Supreme Court and reiterated that the payment of interest was accordingly made at the rate of 12 per cent per annum on the duty amount to be refunded to the Department and there was no further liability of the petitioner to the Department. By letters dated 16.4.1998 at Annexure "H", 6th May, 1998 at Annexure "K" and 5th July, 1998 at Annexure "M" to the petition, the Supdt. of Central Excise reiterated the demand of full payment at the rate of 20 per cent under Section 11AA read with Section 11AB of the Act. On 13th July, 1998, as per Annexure "N" to the petition, the petitioner wrote to the Commissioner of Central Excise, Ahmedabad that despite the fact that under the decision of the Supreme Court the petitioner had to pay back the refund amount with interest at the rate of 12 per cent to the department and it was accordingly paid in full, the Superintendent of Central Excise was insisting on payment of the amount in terms of Section 11AA, read with Section 11AB of the Act. On 15th July, 1998, the Assistant Commissioner of Central Excise, Nadiad ordered attachment of goods as per Annexure "O" to the petition, under Rule 230 of the Central Excise Rules, read with Section 11 of the Act, stating that if the dues are not paid within fifteen days, the goods will be auctioned. The Supdt. of Central Excise, on 10th August, 1998 wrote a letter to the Assistant Commissioner that the petitioner was required to pay the delayed payment in instalments with interest at the rate of 20 per cent under Section 11AA read with Section 11AB of the Act and that the difference of interest was payable by the petitioner as worked out in that letter. The petitioner has challenged the impugned letters of demand dated 10.8.1998 and 30.10.1998 (Annexure "P" collectively).

B.1 After the decision of the Hon'ble Supreme Court, the respondent had filed applications Exhibits 79 and 80 in the Court of Civil Judge (Senior Division), Nadiad for release of the Bank guarantee dated 10.10.1999 for Rs. 10 crores, which was furnished by the petitioner pursuant to the order dated 14.8.1984 of the Supreme Court. The trial Court made orders on these applications from time to time which are placed on record by the learned Counsel. On 19.6.1997, the petitioner made application Ex. 102 in respect of the respondent's applications Exhibits 79 and 80, pointing out that pursuant to the petitioner's request, the respondent had granted permission to pay the balance amount including interest in 12 monthly instalments beginning from April, 1997. The petitioner's representation dated 26th March, 1997 - Exh. 102/A and the Commissioner's permission dated 30.4.1997 at Exh. 102/B were brought to the notice of the trial Court and the Court was requested to dispose of the applications Exh. 79 and 80 in terms of the agreement arrived at between the parties. By order below Ex. 102 made on 19.6.1997, the trial Court granted the application leaving it open for the department to move the Court, if the petitioner did not comply as per the permission of the Department contained in their letter dated 30.4.1997 (Exh. 102/B). The bank guarantee was ordered to be extended till the entire balance amount with interest was not fully paid-up.

B.2 It will be noted that at no point of time before the trial Court did the Department take up the contention in this matter that interest was chargeable at the rate of 20 per cent under Section 11AA of the Act, notwithstanding the order of the Hon'ble Supreme Court to repay the amount with 12 per cent interest from the date of recovery till the date of repayments. The letter dated 30.4.1997 stating that the Commissioner of Central Excise and Customs, Vadodara had permitted the balance amount including interest to be paid by instalments did not at all mention the enhanced rate of interest of 20 per cent as a condition for such instalments. The amount together with interest for which instalments were sought, was calculated on the basis of the interest rate of 12 per cent per annum fixed by the Supreme Court for the repayments, which were to be made by the petitioner on its losing in the

appeals before the Supreme Court.

8. In paragraphs 4, 5 and 6 of the affidavit-in-reply dated 30th March, 1999 filed in Special Civil Application No. 1145 of 1999, the respondent while admitting that the petitioner had paid the balance amount, contended that interest was payable at the rate of 20 per cent per annum from 1.1.1997 and at the rate of 12 per cent per annum till the disposal of the appeal by the Supreme Court on 19.2.1996/4.2.1997. It was also contended that in case where instalment facility was granted, the rate of interest would be the statutory rate of 20 per cent after coming into force of the new Section 11AA of the Act. In the affidavit in reply dated 23.3.2000 filed in Special Civil Application No. 1409 of 1998 on behalf of the respondents, the respondents have taken up the stand that interest was to be charged at the rate of 20 per cent per annum under Section 11AA of the Central Excise Act from 26.8.1995, i.e. three months after the date from which that provision came into effect. This stand of the respondent clearly violates the order of the Supreme Court, by which interest rate was fixed at 12 per cent per annum which appears to be an after-thought, because, as noted above in the order dated 30.4.1997 at Annexure "E" of Special Civil Application No. 1145/99 granting instalments, the Commissioner of Central Excise and Customs, Vadodara did not impose any condition of payment of interest at the rate of 20 per cent per annum from any date, much less from 26.8.1995.

9. Thus, in the two cases governed by the same order of the Hon'ble Supreme Court, falling within the jurisdiction of the Chief Commissioner of Central Excise and Customs, Vadodara, different stands are taken by the Nadiad and Navsari offices of the Department regarding the date of applicability of the rate of interest under Section 11AA of the Act. In one case, it is made applicable from 26.8.1995 being three months after Section 11AA was enacted with effect from 26.5.1995, while in the other case from 1.1.1997. In fact there was no scope for applying the higher rate of interest of 20 per cent in either of these two cases, because the Hon'ble Supreme Court had already ordered that repayments were to be made with interest at the rate of 12 per cent per annum from the date of the recovery of the refund till the dates of such repayments. This was the way already charted out by the Supreme Court for restitution to be made. The respondents had no jurisdiction to modify the rate of interest fixed by the Hon'ble Supreme Court for making repayments by resorting to Section 11AA

of the Act, without approaching the Supreme Court for modification of the condition of 12 per cent rate of interest till repayments were made, after the decision of the Supreme Court, in which the petitioner lost and became liable to pay the amount earlier recovered by way of refund. In fact, that amount was held as not to be refundable, on the doctrine of unjust enrichment and not because it was duty payable. As held by the Supreme Court in direction No.6 of the Format Order, refund applications/appeals preferred in accordance with directions 1, 2, 3 and 4 were to be entertained only if the applicant for refund or appellant filed affidavit stating that he had not passed on the burden of the duty which was claimed by way of refund, to another person. No such assertion could be made by the petitioner as its refund claims came to be rejected by the Supreme Court and the petitioner's case was therefore, governed by the direction No.7(a), making it liable to pay back the amount that it had obtained by way of refund, to the Department and entitling the Department to recover the same in accordance with law. The amounts so recovered from the petitioner in both these cases were the entire decretal amounts in respect of which the interim relief was granted and that had become repayable to the Department with interest at 12 per cent per annum from the date when the petitioner recovered the amounts, until they were repaid after the petitioner lost in the appeals before the Supreme Court. Neither in any restitution proceedings under Section 144 of the CPC, nor under the coercive recovery proceedings under Section 11 of the Central Excise Act, could the respondents have varied the rate of interest of 12 per cent per annum so fixed by the Hon'ble Supreme Court while granting the interim relief as a condition imposed for repayment in the event of losing in those appeals.

10. In fact, resort to Sections 11AA and 11AB by the respondents for charging interest at the rate of 20 per cent per annum, is not warranted in the present case. Section 11A of the Act, inter-alia, provides for recovery of duties erroneously refunded and requires a show cause notice to be given within six months (five years in cases of fraud etc.) from the relevant date on the person chargeable to duty, to show cause as to why he should not pay the amount specified in the notice. Admittedly, no such question arose in these cases for taking steps for recovery of erroneous refund and no show cause notice was ever given under Section 11A of the said Act. Section 11AA on which reliance is placed by the department comes into play only when duty is determined under Section 11A(2) and there is failure of payment of such duty

within three months. Then only the person chargeable would become liable to pay interest as may be fixed by the Board, between ten and thirty per cent (which is 20%) on such duty. As admittedly there had been no determination made under Section 11A(2) after issuing any show cause notice under Section 11A(2) of the Act, there was no scope for applying the rate of 20% under Section 11AA or under Section 11AB of the Act.

11. The rate of 20% is clearly resorted to by the respondents with reference to Section 11AA of the Act and not dehors it by way of any contractual stipulation. Hence, the faint attempt made during arguments on behalf of the respondents to dissociate the rate of 20 per cent from Section 11AA as if it was an independent contractual stipulation for award of instalments is not warranted by the facts of the case, since the petitioner never agreed to any such stipulation either expressly or impliedly and in fact, there was no such stipulation in the order granting instalments in one case while in the other where the rate of 20 per cent interest was mentioned as a condition applicable from 26.8.1995 i.e three months after Section 11AA came into force, it was seriously disputed by the petitioner on the ground that the Supreme Court had already fixed the rate of interest at 12 per cent for such repayments. In fact, reference to the date of 26.8.1995, i.e. three months after 26.5.1995, when Section 11AA came into force, for imposing rate of interest at 20 per cent fixed under it by the Board, rules out the argument that it was imposed by way of any stipulation for giving the facility of instalments which situation arose only after the petitioner made a representation for instalments in March, 1997.

12. The whole attempt to invoke Section 11AA for imposing the rate of 20 per cent interest despite the Supreme Court having already fixed the rate of 12 per cent till the repayments were made by the petitioner is therefore, totally arbitrary and illegal. The impugned action and orders of recovery of interest at the rate of 20 per cent per annum under Section 11AA or under Section 11AB sought to be effected by the respondents are therefore, hereby declared to be illegal and inoperative insofar as they conflict with the order passed on 14.8.1984 by the Supreme Court fixing the rate of interest at 12 per cent from the date of recovery of the refund, until repayments to the department. The calculations in respect of the recovery of the refund from the petitioner as per the orders of the Supreme Court will be finalised on this basis in both the cases by the Department and if anything is found to be still

due to be recovered from the petitioner, the Department will be free to recover the same as per the decision of the Supreme Court and if excess amount is found to have been recovered, it shall make suitable refund orders in respect thereof, within two months of the date of receipt of this order. Rule is made absolute accordingly in both the petitions with no order as to costs.

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*/Mohandas